

LEGISLATIVE AND REGULATORY FRAMEWORK

INFORMATION PAPER

**Ministerial Council on Energy
Standing Committee of Officials**

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Energy Market Reform
Legislative and Regulatory Framework

The Ministerial Council on Energy Standing Committee of Officials (**SCO**) is issuing this paper as part of its process for providing information in relation to the legislative and regulatory framework that is being proposed for Australia's electricity and gas markets.

This process will entail information sessions being held from 16 to 20 August 2004 in Brisbane, Sydney, Melbourne, Adelaide and Hobart as advised in Bulletin No. 18. These sessions will provide an opportunity for stakeholders to ask questions and raise issues.

Please direct any enquiries regarding these information sessions to Neville Henderson, on (03) 8603 3765.

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ENERGY MARKET REFORM

LEGISLATIVE AND REGULATORY FRAMEWORK

1. Overview

This paper describes reforms that are currently proposed in relation to the legislative and regulatory framework that applies to the Australian energy market. These reforms are being made in accordance with the Australian Energy Market Agreement dated 30 June 2004 between the Commonwealth and the States and Territories (*AEMA*).

As set out in the Background section, one of the critical elements of these reforms is the improvement of the governance arrangements that apply in relation to the Australian energy market, through separating policy making, rule-making and energy market development, and economic regulation and market rule enforcement. Subsequent sections of this paper then describe the policy role of the Ministerial Council on Energy, and the functions and composition of the Australian Energy Market Commission (which will have responsibility for rule-making and energy market development) and the Australian Energy Regulator (which will have responsibility for economic regulation and market rule enforcement).

A further important element of the reform package is a streamlined rule change process. This process is described in detail in a separate consultation paper.¹ This paper describes the associated proposal to convert the provisions of the National Electricity Code into rules made under the National Electricity Law, and the initial amendments that will need to be made to the rules contained in the National Electricity Code to accommodate the proposed reforms.

The remaining sections of this paper describe the reforms proposed in relation to appeals, enforcement and information sharing.

Any changes that may need to be made to the access regime relating to gas transmission and distribution will be considered as part of a consideration of and response to the Productivity Commission report "Review of the Gas Access Regime". The issue of merits review will be part of this consideration.

2. Background

In December 2003 the Ministerial Council on Energy (*MCE*) announced a program for major reforms to the Australian energy market to be implemented in the period 2004 to 2006.² This reform package, which was subsequently endorsed by the Council of Australian Governments (*COAG*), is intended to strengthen competition and encourage investment in the Australian energy market.

One of the critical elements of this reform package is the reform of electricity and gas market regulatory structures and institutional mechanisms, particularly to improve the governance

¹ SCO Consultation Paper "Energy Market Reform: Proposed National Energy Rule Change Process", 9 August 2004.

² Ministerial Council on Energy Communiqué, 11 December 2003.

arrangements that apply in relation to the Australian energy market. The proposed new governance arrangements entail the separation of:

- policy making – which is the responsibility of the MCE;
- rule-making and energy market development - which is to be the responsibility of the Australian Energy Market Commission (**AEMC**); and
- economic regulation and market rule enforcement – which is to be the responsibility of the Australian Energy Regulator (**AER**).

The Australian Competition and Consumer Commission (**ACCC**) is to retain responsibility for competition regulation under Part IV of the Trade Practices Act 1974 (Cth) (**TPA**), as well as for industry access code approvals under Part IIIA and authorisations under Part VII. The National Electricity Market Management Company Limited (**NEMMCO**) will continue to be responsible for the day-to-day operation of both the power system and the electricity wholesale spot market in the National Electricity Market. However, both the National Electricity Code Administrator Limited (**NECA**) and the National Electricity Tribunal (**NET**) will be dissolved.³

A memorandum of understanding between the AEMC, AER and ACCC (which is to be endorsed by the MCE) will address consultation and cooperation between these bodies.⁴

The process for changing the wholesale energy market and access rules which are currently embodied in the National Electricity Code (for electricity in the National Electricity Market jurisdictions) and the National Gas Access Code (for gas transmission and distribution) needs to be revised to accommodate this new governance structure, as well as to strengthen end-user and industry consultation in relation to rule changes and to streamline the rule change process itself. Streamlining the rule change process is particularly important in the case of the National Electricity Code where there has been considerable duplication as between the processes of NECA and the ACCC. The proposed new process for changing the National Electricity Code (and any subsequent rules that may be made in relation to the National Electricity Market) is the subject of a separate consultation paper. Any changes that may need to be made to the access rules relating to gas transmission and distribution will be considered as part of a consideration of and response to the Productivity Commission report "Review of the Gas Access Regime".

This paper describes reforms that are currently proposed in relation to the legislative and regulatory framework that applies to the Australian energy market. These reforms are being made in accordance with the AEMA.⁵

3. Ministerial Council on Energy

The AEMA records the agreement of the Governments that the MCE will not be engaged directly in the day-to-day operation of the energy market or the conduct of regulators.⁶ Instead, the function of the MCE will be to make policy in relation to the energy market.

³ AEMA, cl.11.1, 11.2, 11.5.

⁴ See SCO Discussion Paper, "AER – AEMC – ACCC Memorandum of Understanding (MoU) Framework", March 2004.

⁵ The AEMA also provides that the uniform legislation and regulations that implement the proposed legislative scheme in the Commonwealth and each of the States and Territories is not to be amended or otherwise limited, varied or altered without the agreement of the MCE: AEMA, cl.6.5, 6.6.

The way in which the MCE will perform this policy making role is through:

- requesting the AEMC to carry out a review or inquiry, or to provide advice to the MCE, in relation to a market development issue in accordance with terms of reference issued by the MCE (the results of such a review, inquiry or advice may entail the AEMC making recommendations to the MCE on any relevant changes to the rules that relate to the National Electricity Market);
- initiating a proposal to change the rules that relate to the National Electricity Market (including in response to a review, inquiry or advice carried out or provided by the AEMC as a result of a request by the MCE); and
- publishing a statement of policy principles (with which decisions of the AEMC are required to be consistent) – any such statement of policy principles must be consistent with specified objectives which relate to the National Electricity Market (see paragraph 4.1 below).

4. Australian Energy Market Commission

The AEMC has been established as a new statutory commission under the Australian Energy Market Commission Establishment Act 2004 (SA)⁷ and its head office will be located in Sydney.⁸

4.1 Functions of AEMC

The AEMC will have such rule-making, market development and other functions as are conferred on it under the National Electricity Law, the National Electricity Code, the Gas Pipelines Access Law, the National Gas Access Code and any other agreed Commonwealth, State or Territory law that relates to energy.⁹ It is intended that the assumption by the AEMC of its responsibilities in relation to the Australian energy market will be staggered. The AEMC will¹⁰:

- initially be responsible for rule-making and market development in respect of the wholesale electricity market and electricity transmission networks in the National Electricity Market jurisdictions (and will take over the functions of NECA in this regard);
- by no later than 30 June 2005 assume responsibility for rule-making and market development in respect of access to gas transmission and distribution networks (and will take over the functions of the National Gas Pipelines Advisory Committee, and (to the extent applicable) the Code Registrar, in this regard); and
- by no later than 31 December 2006 assume responsibility for rule-making and market development in respect of electricity and gas distribution networks and retail markets (other than retail pricing) following the development of an agreed national framework.

⁶ AEMA, cl.4.5.

⁷ See Australian Energy Market Commission Establishment Act, s.5.

⁸ Ministerial Council on Energy Communiqué, 2 April 2004.

⁹ Australian Energy Market Commission Establishment Act, s.6; see also Australian Energy Market Act 2004 (Cth), s.9(1).

¹⁰ AEMA, cl.8.1(a)-(c).

The Commonwealth and each of the States and Territories will pass the legislation that is necessary to confer on the AEMC the functions referred to above. The exceptions are that, in Western Australia and the Northern Territory, the AEMC will only be empowered to perform functions relating to the gas market (although either of those jurisdictions may subsequently elect to become subject to the jurisdiction of the AEMC in respect of electricity).¹¹

More specifically, the principal initial functions of the AEMC will include:

- making and amending the rules that relate to the National Electricity Market (currently embodied in the National Electricity Code) – the AEMC itself will not be empowered to initiate any change to these rules (other than where the change is necessary to correct a minor administrative error) but will be required to manage the rule change process and to consult and decide on rule changes that are proposed by the MCE, the Reliability Panel or any other person;
- providing advice to the MCE as requested by the MCE – this may entail the AEMC conducting such inquiries as are directed by the MCE;
- keeping the rules that relate to the National Electricity Market under review and recommending to the MCE such changes to those rules as the AEMC considers appropriate (it will then be for the MCE to decide whether to actually initiate such a rule change through the rule change process described in the separate consultation paper);
- carrying out such inquiries and research as the AEMC thinks fit in order to promote discussion, and provide advice, as to matters related to market development; and
- the functions currently conferred on the Reliability Panel under the National Electricity Code (the Reliability Panel will instead perform an advisory role for the AEMC, and its membership will be restructured to include representatives of the retail, generation, transmission, distribution and end-user segments of the electricity industry so as to enable it to properly fulfil this advisory function).

In performing its functions the AEMC will be required to have regard to any relevant objectives.¹² In the case of the National Electricity Market, the primary objective will be to promote the long term interests of consumers of electricity with respect to price, quality and reliability of electricity services and economically efficient investment and innovation. In seeking to achieve this primary objective, the AEMC will be required to have regard to the following objectives:

- the market should be competitive;
- the operation and use of, and investment in, infrastructure in the electricity industry (including transmission and distribution services) should be economically efficient;
- customers should be able to choose which supplier (including generators and retailers) they will trade with;
- any person wishing to do so should be able to gain access to the interconnected transmission and distribution network;

¹¹ AEMA, cl.6.2(c), (d); see also cl. 6.2(a), (b), (e).

¹² Australian Energy Market Commission Establishment Act, s.8.

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- a person wishing to enter the market should not be treated more favourably or less favourably than if that person were already participating in the market;
 - a particular energy source or technology should not be treated more favourably or less favourably than another energy source or technology; and
 - the provisions regulating trading of electricity in the market should not treat intrastate trading more favourably or less favourably than interstate trading of electricity.

Moreover, in undertaking its rule-making functions, the AEMC will apply a net benefit test based on the achievement of these objectives.

Decisions of the AEMC made in performing its rule-making and rule review functions must be consistent both with the objectives referred to above and with any statement of policy principles that is published by the MCE.¹³

4.2 Composition of AEMC

The AEMC will comprise three commissioners¹⁴:

- the chairperson, who will be nominated by agreement of at least six of the State and Territory representatives on the MCE;
- another commissioner who is nominated by agreement of at least six of the State and Territory representatives on the MCE; and
- a commissioner who is nominated by the Commonwealth representative on the MCE.

Each commissioner will be appointed for a fixed term of 5 years¹⁵, but is subject to earlier removal for:

- breach of, or non-compliance with, a condition of appointment;
- misconduct; or
- failure or incapacity to carry out official functions satisfactorily.¹⁶

A quorum for AEMC meetings will consist of the chairperson and another commissioner¹⁷, and decisions of the AEMC will be taken by majority vote.¹⁸

The AEMC is to appoint a chief executive, who will be responsible for giving effect to the decisions and policies of the AEMC.¹⁹ The AEMC is also empowered to appoint other staff and to engage consultants.²⁰

¹³ See AEMA, cl.4.4(e).

¹⁴ Australian Energy Market Commission Establishment Act, s.12; AEMA, cl.7.1.

¹⁵ Australian Energy Market Commission Establishment Act, s.13(1)(a).

¹⁶ Australian Energy Market Commission Establishment Act, s.13(2).

¹⁷ Australian Energy Market Commission Establishment Act, s.21(4).

¹⁸ Australian Energy Market Commission Establishment Act, s.21(5).

¹⁹ Australian Energy Market Commission Establishment Act, s.16.

²⁰ Australian Energy Market Commission Establishment Act, ss.17, 19.

5. Australian Energy Regulator

The AER will be established as a new statutory body under the TPA²¹ and its head office will be located in Melbourne, separately from the ACCC, with enforcement and market monitoring functions in Adelaide.²²

5.1 Functions of AER

The AER will have such functions as are conferred on it under the National Electricity Law and any rules made under it (including the National Electricity Code), and any other agreed State or Territory law that relates to energy.²³ It is intended that the assumption by the AER of its responsibilities in relation to the Australian energy market will be staggered. The AER will²⁴:

- initially be responsible for the economic regulation of the wholesale electricity market and electricity transmission networks in the National Electricity Market jurisdictions (and, to this end, will take over the ACCC's functions in relation to the regulation of electricity transmission pricing and NECA's functions in relation to monitoring, reporting on and enforcing compliance with the National Electricity Code);
- by no later than 30 June 2005 assume responsibility for the economic regulation of gas transmission networks and the enforcement of the National Gas Access Code; and
- by no later than 31 December 2006 assume responsibility for the economic regulation of both National Electricity Market and gas distribution networks and retail markets (other than retail pricing) following the development of an agreed national framework - however, any jurisdiction may, at its discretion, subsequently elect to also transfer responsibility for retail pricing to the AER.

The Commonwealth and each of the States and Territories will pass the legislation that is necessary to confer on the AER the functions referred to above. The exceptions are that, in Western Australia, the AER will not be empowered to perform functions relating to the gas or electricity markets and, in the Northern Territory, the AER will not be empowered to perform functions relating to the electricity market (although either of those jurisdictions may subsequently elect to become subject to the jurisdiction of the AER in relation to these markets).²⁵

More specifically, the principal initial functions of the AER will include:

- making and amending transmission network revenue and price regulatory determinations (as contemplated by Parts B and C of Chapter 6 of the National Electricity Code);
- developing and publishing service standards to be applied to transmission networks (as contemplated by clause 6.2.4(a) of the National Electricity Code);

²¹ See Trade Practices Amendment (Australian Energy Market) Act, Schedule 1, cl.9 (proposed new s.44AE of the TPA).

²² Ministerial Council on Energy Communiqué, 2 April 2004.

²³ Trade Practices Amendment (Australian Energy Market) Act, Schedule 1, cl.9 (proposed new ss.44AH-44AK of the TPA); see also Australian Energy Market Act 2004 (Cth), s.10(1).

²⁴ AEMA, cl.9.1(a)-(d).

²⁵ AEMA, cl.6.2(c), (d); see also cl.6.2(a), (b), (e).

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- making and amending statements of regulatory practice and principles (the National Electricity Law will require the AER, following consultation, to publish such a statement which will set out the general approach of the AER in performing its economic regulatory functions) – the initial statement of regulatory principles will be the ACCC's current "Draft Statement of Regulatory Principles for the Regulation of Transmission Revenues" and regulations under the National Electricity Law will include minimum requirements as to the content of this statement, eg. in relation to information requirements, the timetable for the regulatory determination process and the process itself (public notice, submissions, public hearings and conferences, draft determinations, etc);
 - making and amending guidelines in respect of the ringfencing of operations and information flows between activities, or within a business, of a regulated entity (including the ringfencing guidelines contemplated by Part G of Chapter 6 of the National Electricity Code);
 - applying tests in respect of augmentations to networks (including the regulatory test referred to in clause 5.6.5A of the National Electricity Code); and
 - enforcing the National Electricity Law and rules made under it (including the National Electricity Code) and investigating and bringing proceedings in connection with any breaches of them.

Like the AEMC, the primary objective of the AER in the context of performing its economic regulatory functions for the National Electricity Market will be to promote the long term interests of consumers of electricity with respect to price, quality and reliability of electricity services and economically efficient investment and innovation. In seeking to achieve this primary objective, the AER will be required to have regard to the following objectives:

- the market should be competitive;
- the operation and use of, and investment in, infrastructure in the electricity industry (including transmission and distribution services) should be economically efficient;
- customers should be able to choose which supplier (including generators and retailers) they will trade with;
- any person wishing to do so should be able to gain access to the interconnected transmission and distribution network;
- a person wishing to enter the market should not be treated more favourably or less favourably than if that person were already participating in the market;
- a particular energy source or technology should not be treated more favourably or less favourably than another energy source or technology; and
- the provisions regulating trading of electricity in the market should not treat intrastate trading more favourably or less favourably than interstate trading of electricity.

These objectives will be supplemented by other more specific objectives contained in the National Electricity Code (eg. the objectives contained in clause 6.2.2 of the Code in relation to transmission revenue regulation).

5.2 Composition of AER

There will be three members of the AER²⁶:

- a member who is nominated by the Commonwealth (on the recommendation of the ACCC chairperson) and who is also a full-time member of the ACCC; and
- two full-time or part-time members who are nominated by agreement of at least five of the State and Territory representatives on the MCE whose energy markets are regulated by the AER²⁷ - such members must have knowledge of (or experience in) industry, commerce, economics, law, consumer protection or public administration and will become associate members of the ACCC.

The chair of the AER will be nominated by agreement between the Commonwealth representative on the MCE and a simple majority of the State and Territory representatives on the MCE whose energy markets are regulated by the AER (the first chair will be appointed for a term of 3 years, with an option for extension, but no chair may be appointed for more than a 5 year term)²⁸.

Each member of the AER can be appointed for a term of up to 5 years²⁹, but is subject to earlier removal:

- for misbehaviour or physical or mental incapacity;
- if the member becomes bankrupt;
- if the member fails (without reasonable excuse) to disclose a conflict of interest; or
- if the member takes an unauthorised absence or engages in unauthorised employment or employment that could conflict with the proper performance of the member's duties.³⁰

A quorum for AER meetings is 2 members (including the chair and the Commonwealth-nominated member)³¹, and decisions of the AER can only be taken by unanimous agreement of the members present and voting.³²

6. Legislative scheme for National Electricity Market

6.1 National Electricity Code as a set of rules

The National Electricity Law, which has been made by South Australia as lead legislator, currently applies as a law of each of the participating jurisdictions. As contemplated by the National

²⁶ Trade Practices Amendment (Australian Energy Market) Act, Schedule 1, cl.8 (proposed new s.8AB of the TPA) and cl.9 (proposed new ss.44AG, 44AM, 44AN, 44AO(2), 44AP(1), (3) of the TPA); AEMA, cl.7.4-7.5.

²⁷ Western Australia has not currently elected to subject its energy markets to the jurisdiction of the AER.

²⁸ Trade Practices Amendment (Australian Energy Market) Act, Schedule 1, cl.9 (proposed new s.44AR of the TPA); AEMA cl.7.7.

²⁹ Trade Practices Amendment (Australian Energy Market) Act, Schedule 1, cl.9 (proposed new ss.44AM(2), 44AP(2) of the TPA).

³⁰ Trade Practices Amendment (Australian Energy Market) Act, Schedule 1, cl.9 (proposed new s.44AAB of the TPA).

³¹ Trade Practices Amendment (Australian Energy Market) Act, Schedule 1, cl.9 (proposed new s.44AAD(3) of the TPA).

Electricity Law³³, the Ministers of the participating jurisdictions approved the initial version of the National Electricity Code, and that version has since been progressively amended in accordance with Chapter 8 of the Code and the National Electricity Law.

Under the proposed legislative scheme for the National Electricity Market, the National Electricity Law (and regulations made under it) will continue to be applied as a law of each participating jurisdiction (although it will now also be applied as a law of the Commonwealth in the adjacent area of each State and Territory³⁴). However, the AEMC will be empowered to make rules under the National Electricity Law (this rule-making process is the subject of a separate consultation paper) and those rules (which will initially be comprised of the National Electricity Code) will be applied as rules in each of the participating jurisdictions (including the Commonwealth) by virtue of the operation of Application Acts passed in those jurisdictions. As rules made under a law, these rules will be binding on any persons to whom they are expressed to apply (including Code Participants and NEMMCO).

For these purposes the National Electricity Law will be amended to empower the AEMC to make rules for the operation of the National Electricity Market, the activities of participants in that market, the registration of those participants, the operation of the power system for system security purposes, the operation of, and access to, electricity transmission and distribution systems, transmission and distribution service pricing, metering, the calculation or estimation of electricity usage, dispute resolution processes for use by Code Participants and others, the calculation, imposition and collection of participant fees by NEMMCO, and ancillary matters.

6.2 Rule changes

The National Electricity Code has been authorised by the ACCC under Part VII of the TPA. Accordingly, the National Electricity Code currently contemplates that any proposed Code changes that may materially affect the authorisation granted by the ACCC or otherwise require authorisation by the ACCC must be submitted to the ACCC for authorisation.³⁵ The access-related provisions of the National Electricity Code have also been accepted by the ACCC as an industry code under Part IIIA of the TPA, with the result that any proposed changes to those provisions require the consent of the ACCC.³⁶ Accordingly, the National Electricity Code currently contemplates that any proposed Code changes that may materially affect the access regime constituted by the Code must be submitted to the ACCC for approval.³⁷ This has resulted in duplication as between the processes of NECA and the ACCC whereby the same proposed Code changes have been separately and independently considered by NECA and the ACCC.

³²Trade Practices Amendment (Australian Energy Market) Act, Schedule 1, cl.9 (proposed new s.44AAAD(4) of the TPA). This voting requirement will subsequently change to a simple majority when the AER assumes responsibility for the national regulation of electricity and gas distribution and retailing (other than retail pricing): AEMA, cl.9.3(a).

³³ National Electricity Law, cl.6.

³⁴ Australian Energy Market Act 2004 (Cth), s.6(a)(i); see also ss.6(a)(ii), 7, 12. For these purposes an adjacent area in respect of a State or Territory is the area that is identified as such in section 5A of the Petroleum (Submerged Lands) Act 1967 (Cth).

³⁵ National Electricity Code, cl. 8.3.7(a)(3), (b)(1), (3), 8.3.9(a)(2), (b), (d).

³⁶ TPA, ss.44ZZAA (see also s.44ZZA (4A)).

³⁷ National Electricity Code, cl.8.3.7(a)(2), (b)(2), 8.3.9(a)(2), (c), (d).

It is therefore proposed to streamline the process for changing the rules relating to the National Electricity Market in conjunction with the assumption of NECA's rule-making responsibilities by the AEMC. This will be effected through amendments to the National Electricity Law that establish a new rule change process in the National Electricity Law to replace that currently contained in Chapter 8 of the National Electricity Code (this is the subject of a separate consultation paper). This new rule change process will confer primary responsibility for the rule change process on the AEMC although, as stated earlier, rule changes may not generally be initiated by the AEMC.³⁸

In addition, amendments have been made to the TPA to allow the ACCC to rely on consultations conducted by the AEMC in its rule-making process.³⁹

It is also proposed that there will be a Memorandum of Understanding between the AEMC, AER and ACCC under which⁴⁰:

- the AEMC will provide any proposed rule change and submissions received in relation to it to the ACCC and the AER;
- the ACCC will advise the AEMC if it identifies any competition or access-related issues that arise out of the proposed rule change and the AEMC will confer with the ACCC to resolve those issues;
- the AEMC will seek submissions and gather information on competition or access-related issues relating to the proposed rule change which are raised by stakeholders or the ACCC;
- in making any decision on the proposed rule change, the AEMC will confer with the ACCC on competition and access-related issues relating to the proposed rule change; and
- the AEMC will consult with the AER on any regulatory or enforcement issues that may arise in relation to a proposed rule change.

The AER might also assist the ACCC in determining whether a proposed rule change raises any competition or access-related issues and, if so, how those issues should be addressed.

6.3 Once off amendments to the National Electricity Code

In order to implement the reforms described in this paper, the National Electricity Law will be amended to permit the rules embodied in the National Electricity Code to be changed pursuant to a "once off" Ministerial order. These changes will be made following consultation by SCO in relation to them. The principal changes that are expected to be necessary are changes that arise from:

- the abolition of NECA and the reallocation of NECA's functions between the AEMC and the AER;
- the abolition of the NET and the associated removal of "reviewable decisions" (see further below);

³⁸ Under this new rule change process, changes to jurisdictional derogations (like other rule changes) will also be the primary responsibility of the AEMC.

³⁹ Trade Practices Amendment (Australian Energy Market) Act, Schedule 1, cl.12 (proposed amendment to s.44ZZAA(8) of the TPA), cl.13 (proposed new s.44ZAB of the TPA) and cl.15 (proposed new s.90B of the TPA).

⁴⁰ SCO Discussion Paper, "AER – AEMC – ACCC Memorandum of Understanding (MoU) Framework", March 2004.

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- the replacement of the Code change procedure in the Code with a new rule change procedure (the subject of a separate consultation paper) which is to be contained in the National Electricity Law;
 - other amendments to the National Electricity Law which remove the need for certain provisions to be included in the National Electricity Code (eg. the "protected provisions" which define the market objectives, and describe NEMMCO's functions, will now be included in the National Electricity Law); and
 - the transition of the National Electricity Code to rules that are made under the National Electricity Law.

In relation to the transition of the National Electricity Code to rules that are made under the National Electricity Law, the SCO has received advice from Senior Counsel⁴¹ that:

- If the obligations of Code Participants under the National Electricity Code are drafted as mandatory rules made under the National Electricity Law, then the principal prohibitions contained in Part IV of the TPA will not apply to actions taken by a Code Participant in compliance with those rules because there will not be any contract, arrangement, understanding or transaction which attracts the operation of those prohibitions.
- Moreover, if these mandatory rules specify the terms (including price) on which electricity, ancillary services or other goods or services are to be supplied or acquired, then any contract that may arise as a result of those rules will not have a proscribed purpose or effect for the purposes of these TPA prohibitions (and will not result in a breach of those prohibitions) because it is the mandatory rules, and not any such contract, which would have that purpose or effect.

The consequence of this is that, provided the relevant provisions of the National Electricity Code are appropriately amended, their transition to rules made under the National Electricity Law will obviate the need for those rules to be authorised by the ACCC under Part VII of the TPA.

Once made, the once off rule changes made by the Ministerial order will become subject to change in accordance with the new rule change procedure, including through the application of the net benefit test and the public consultation arrangements.

7. Appeals

Provision will be made for judicial review (but not merits review) of decisions of the AER and AEMC that relate to the National Electricity Market on the application of any person who is aggrieved.

In the case of the AER, this is consistent with the existing situation where there are no avenues for merits review of the ACCC's electricity transmission revenue determinations under the National Electricity Code (such decisions will remain subject to review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) and at common law).

In the case of the AEMC, this is consistent with the performance of its statutory function as a rule-maker being akin to the making of delegated legislation. Moreover, the fact that the AEMC, in its rule-making and market development activities, is subject to substantial consultation obligations

⁴¹ Noel Hutley SC and Sarah Pritchard, Memorandum of Advice dated 5 August 2004.

and accountability requirements means that the merits of its decisions will be subject to public and transparent debate.

Consistently with the streamlining which is proposed in relation to the process for changing the rules relating to the National Electricity Market, the classification of certain decisions as reviewable decisions in the National Electricity Code will also be removed. However, the Disputes Resolution Process in the National Electricity Code will be available to parties who wish to dispute any decision of NEMMCO. Judicial review is available for all decisions of NEMMCO.

8. Enforcement

The abolition of the NET will result in the need to modify the legislative and regulatory regime that applies in relation to the enforcement of the National Electricity Code. Under the new regime, the AER will be empowered to enforce the National Electricity Law and any rules made under it (including the National Electricity Code) through applying to a Court for an order declaring that a person is in breach of that Law or those rules. If the Court makes such a declaration the Court may also order the person to pay a civil penalty, to desist from the breach, to remedy the breach or to implement a compliance program. The AER may also apply to the Court for an injunction where a person has engaged in, is engaging in or is proposing to engage in conduct in breach of the National Electricity Law or any rules made under it.⁴²

The National Electricity (South Australia) Act and the National Electricity Law will be amended to provide that pecuniary penalties for breaches of the rules made under the National Electricity Law (including the National Electricity Code) can only be imposed by a Court (ie. the AER will not have the power, previously possessed by NECA, to impose a civil penalty of \$20,000 or less).⁴³

The National Electricity Law will also prescribe the circumstances in which a breach of the rules under the National Electricity Law (including the National Electricity Code) can be relied on in civil proceedings.

9. Sharing and Provision of Information

Each of the AEMC, AER and ACCC is (or will be) empowered to share information that it obtains with each of the other bodies where that information is relevant to the functions of those other bodies (in which case those other bodies may use that information for any purpose connected with their functions).⁴⁴

In addition, the National Electricity Law will be amended to enable:

- the AEMC to require Code Participants to provide it with such information as it needs for the purpose of its rule-making function or for the purpose of monitoring and reporting on the effectiveness or operation of any rule; and

⁴² See, eg., Trade Practices Amendment (Australian Energy Market) Act, Schedule 1, cl.9 (proposed s.44AAG of the TPA) in relation to the Federal Court. The National Electricity Law and Application Acts in each of the relevant States and Territories will also provide for the Courts in their jurisdiction to make similar orders.

⁴³ The civil penalties fund will, however, be abolished.

⁴⁴ See Australian Energy Market Commission Establishment Act, s.24; Trade Practices Amendment (Australian Energy Market) Act, Schedule 1, cl.9 (proposed new s.44AAF) and cl.17 (proposed new s.157A of the TPA).

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- the AER to require the provision to it of information where that information is relevant to the performance of the AER's functions (eg. in relation to economic regulation).

Finally, the AER will have power under the National Electricity Law:

- to require the provision to it of information where the AER has reason to believe that the information is relevant to a possible breach of the National Electricity Law or any rules made under it (including the National Electricity Code); and
- to apply for, and execute, a search warrant where there are reasonable grounds for believing that there is, has been or will be a breach or possible breach of the National Electricity Law or any rules made under it (including the National Electricity Code).

MCE Standing Committee of Officials

9 August 2004